

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-2065

Docket No. 75-2065

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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GUS SCLAFANI,

Petitioner-Appellant,

- against -

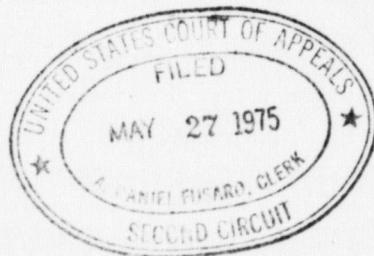
H. R. HOGAN, Warden, U.S.
Penitentiary, Atlanta, Georgia,

Respondent-Appellee.

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APPENDIX

CASTRATARO, HERMAN, BEININ & CORRIERO
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GUS SCLAFANI, : UNITED STATES DISTRICT COURT
Prison No. 7180-158, : FOR THE SOUTHERN DISTRICT OF
: NEW YORK.

v. : CASE NO. 75 Civ. 977

MR. H.R. HOGAN, Warden, : JUDGE Palmieri
United States Penitentiary, :
Atlanta, Georgia. :

INDEX TO THE RECORD ON APPEAL

Certified copy of docket entries
Petition pursuant to 28 U.S.C. §2255
Memorandum in support of Petition
Judgment
Notice of Appeal
Clerk's Certificate

DOCUMENTS

A-B
1
2
3
4
5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GUS SCLAFANI,

Petitioner,

-against-

75 Civ. 977 (ELP)

H. R. HOGAN, Warden, United States
Penitentiary, Atlanta Georgia,

Respondent.

-----x

PALMIERI, J.

Gus Sclafani petitions this Court, pursuant to 28 U.S.C. § 2255, for an order dismissing the indictment, setting aside the verdict and vacating the sentence in the case of United States v. Sclafani, 71 Cr. 1243, on the ground that "the Special Attorneys [members of the Strike Force] who procured the aforesaid indictment lacked authority to do so," and that the Court therefore was without jurisdiction. In light of the several cases decided in this district within the last few weeks, infra, the petition is denied.

On October 11, 1972, petitioner was convicted, after a jury trial, of conspiracy to finance an extortionate

credit transaction (18 U.S.C. § 371), three counts charging violations of the Extortionate Credit Transaction Act (18 U.S.C. § 893, 894), two counts of income tax evasion (26 U.S.C. § 7201), and one count charging the making of a false statement (18 U.S.C. § 10001), United States v. Sclafani, 71 Cr. 1243. Thereafter the United States Court of Appeals for the Second Circuit unanimously affirmed the conviction of petitioner and his co-defendant, Ben Ross, United States v. Sclafani, 487 F.2d 245 (1973), and the United States Supreme Court denied certiorari, Sclafani v. United States, 414 U.S. 1023 (1973).

On December 4, 1972, petitioner was sentenced to ten year prison terms on Counts 1, 2 and 4, with five year prison terms on Counts 3, 25, 26 and 27, all of which were to run concurrently with each other except that one of the five year prison sentences was to run consecutively with the other five year sentences. Committed fines of \$10,000 were also imposed on three counts.

On February 26, 1974, petitioner filed a motion for the reduction or modification of sentences, which was denied on March 27, 1974.

Contrary to the assertion of petitioner's counsel, petitioner has made a previous application under 28 U.S.C. § 2255. On October 24, 1974, this Court denied a pro se petition urging that sentence be vacated and the petitioner

remanded for resentencing on the ground that he was prejudiced in the imposition of sentence because of errors in his pre-sentence report. However, as the claim presented in the petition now before us is wholly novel, we must consider it on the merits. Sanders v. United States, 373 U.S. 1 (1962).

The authority of Special Attorneys of the Organized Crime and Racketeering Section of the Criminal Division, United States Department of Justice (the "Strike Force") to seek indictments before grand juries has recently become a subject of debate across the country. Within the Southern District the initial decision on this issue, United States v. Crispino, 74 Cr. 932 (Werker, J. 2-13-75), quashed an indictment on the ground that the Strike Force attorney who procured it had exceeded his commission. Shortly thereafter an opposite conclusion was reached in United States v. Brown, et al., 74 Cr. 867 (Pollack, J., 2-24-75), and Judge Pollack's reasoning has been followed in Sandello v. Curran, M 11-188 (Tenney, J., 2-27-75) and United States v. Jacobson, 74 Cr. 936 (Frankel, J., 3-3-75). In the Eastern District Judge Judd had on February 19 upheld the authority of a Strike Force attorney to bring an indictment, United States v. Albanese, 74 Cr. 814.

As these several opinions have accorded extensive consideration to the plain meaning and legislative history

of 28 U.S.C. § 515 which authorized the appointment of special attorneys, to the numerous cases bearing on such appointments, and to the exigencies of modern law enforcement which impelled the creation of a unified strike force, I am in accord with my brother Judge Frankel of this court that "[w]ith the problem destined for decision in higher courts, it cannot be profitable to retrace the issues and lines of argument considered in the cited opinions.

Jacobson, supra, at p. 2.

I am in complete agreement with the views expressed by Judges Pollack, Tenney and Frankel of this court and of Judge Judd of the Eastern District in upholding the authority of Strike Force attorneys to procure indictments such as the one in the case now before us.

Title 28 U.S.C. § 2255 provides that a hearing shall be held "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" Williams v. United States, 503 F.2d 995 (2d Cir. 1974). The files and records in this case are conclusive in the sense indicated, and there is no necessity for a hearing.

The petition is denied. It is so ordered.

Dated: New York, N.Y.
March 19, 1975

S/
EDMUND L. PALMIERI

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JACOB LAUFER deposes and says that he is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 30th day of June, 1975, he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

MICHAEL A. CORRIERO, ESQ.
Castrataro, Herman, Beinin & Corriero
110 East 59th Street
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jacob Laufer

JACOB LAUFER

Sworn to before me this
30th day of June, 1975

Steven K. Frankel

STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 1977